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Equitable Servitudes in Missouri

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Equitable Servitudes in Missouri[1]

SPECIFIC performance of restrictions upon property before Tulk v. Moxhay. Before the decision in *Tulk v. Moxhay*[2] a contract not to use land in a particular manner was treated by equity courts in the same way as were other negative contracts; if the plaintiff was so injured in the enjoyment of his own land that damages at law did not furnish an adequate remedy, equity would specifically enforce the contract by granting an injunction against the promisor.[3] The right thus to control the use of the property in the hands of the promisor can hardly be classified as other than a property right,[4] but since it was enforcible only against the promisor it was a property right that could be easily destroyed by any alienation of the property and therefore was of relatively small value.

Tulk v. Moxhay. In *Tulk v. Moxhay* the plaintiff, who was the owner of a piece of vacant ground in Leicester Square and

[1]This article, without special reference to Missouri law appeared in the December, 1917, number of the Michigan Law Review and is reprinted here by the courtesy of the editors of that review. The substance of the article will also appear in a forthcoming book on Equity.

[2](1848) 2 Phillips 774. Altho *Tulk* v. *Moxhay* is the leading case on the subject, the point had already been decided in *Whatman* v. *Gibson* (1838) 9 Simons 196. It was a sale of lots under a building scheme and the restrictions were mutual. The court did not say anything about unjust enrichment but merely pointed out the advantage to all the proprietors of preserving the residential character of the neighborhood. The case of *Mann* v. *Stephens* (1846) 15 Simons 377 also antedates *Tulk* v. *Moxhay;* it varies in facts from *Tulk* v. *Moxhay* only in that the assignee entered into a similar covenant with the original covenantor. The reasoning of the court is not reported.

[3]*Martin* v. *Nutkin* (1723) 2 P. Wms. 266 (promise not to ring a bell); *De Wilton* v. *Saxon* (1801) 6 Ves. 106 (not to break up mowing land).

[4]For example, it would logically pass on the plaintiff's death to his heir rather than to his executor.

also of several of the houses forming the square, sold the vacant piece to one Elms, the deed containing a covenant by Elms that he, his heirs and assigns would keep the piece of ground in its then state, uncovered with any buildings, etc. The piece of land passed by several mesne conveyances into the hands of the defendant whose purchase deed contained no similar covenant with his vendor, but he had notice of the original covenant when he made his purchase. The covenant did not run at law against the transferee of Elms because it was not connected with an easement; furthermore, there was not only no common law property right but there was not even a contract right against the defendant, because the defendant had made no such covenant with any one. The defendant having manifested an intention to alter the character of the land and having asserted a right to build thereon, the plaintiff sought and obtained an injunction against his doing so. Such a right as equity declared belonged to the plaintiff as against the defendant in this case was formerly called an equitable easement;[5] It is now more common to call it a covenant running with the land in equity.[6] Since such restrictive agreements are recognized by equity as creating property rights in chattels as well as in land, while the common law recognizes no easements or covenants as giving property rights in chattels, it avoids confusion and misapprehension to call them by the more general term of equitable servitudes.

Argument of the court in Tulk v. *Moxhay.* The court in *Tulk* v. *Moxhay* seemed to rest their decision on the ground that if such a right were not recognized and enforced there would be

[5]At common law there were five kinds of rights which one might have in the land of another, i. e., rights which could be enforced against the present or any future owner of the land: (a) legal charges, (b) natural rights, such as rights of adjacent and subjacent support, (c) easements, (d) profits, and (e) covenants running with the land. Equitable servitudes on land are similar in some respects to common law easements, but there are some points of difference which will be pointed out later in the article.

[6]In Missouri the more common term seems to be equitable easements. See *Miller* v. *Klein* (1913) 177 Mo. App. 557, 573, 160 S. W. 562. In *Zinn* v. *Sidler* (1916) 268 Mo. 680, 689, 187 S. W. 1172 the court said: "to create the limitation on the fee herein contended for, a covenant must have been created, and it is not material whether it is termed an equitable easement.....or a servitude or a restrictive covenant."

unjust enrichment at the expense of the plaintiff. Where the parties in the different transactions after the purchase and covenant by Elms supposed that the restriction was binding on transferees and fixed the price of the property accordingly, unjust enrichment of the defendant would result if the restriction were not enforced against him. And where those same parties supposed that the restriction was not binding on transferees and fixed the price according to that understanding, unjust enrichment would result to the covenantor if the restriction were enforced against the defendant. On the other hand, where there is no misapprehension by the parties as to the legal rule there is no unjust enrichment of any one because the price of the property will be fixed according to the enforcibility or non-enforcibility of the restriction. Consequently the decisions enforcing equitable servitudes against transferees can be rested on the doctrine of unjust enrichment only in the rather abnormal case where the parties were mistaken as to the law. Oddly enough, it has been the orthodox doctrine—now happily disappearing—that equity would give no relief against a mistake of law.[7] At the present day courts usually pay no attention to the question of unjust enrichment in restrictive agreement cases.

A decision which shows that unjust enrichment is not the basis of equitable servitudes is that of *Rogers* v. *Hosegood*.[8] In that case it was held that a transferee of the covenantor was entitled to enforce an equitable servitude on the defendant's property tho the plaintiff knew nothing of the restriction when he bought his property from the covenantee.

Real basis of Tulk v. Moxhay. The court in *Tulk v. Moxhay* reasoned in a circle. Whether there was unjust enrichment of the defendant at the expense of the plaintiff depended upon the extent of the plaintiff's right; i. e., upon whether the plaintiff could enforce the restrictive agreement against only the cove-

[7]The usual reason given for denying relief was that everyone was presumed to know the law—an unfortunate misstatement of the rule that ignorance of the law does not excuse one who has in some way incurred a *prima facie* legal liability; for example, by committing a crime or tort or a breach of contract. The rule should not be applied to one who has incurred no such liability but seeks as plaintiff to be relieved from the consequences of his error.

[8](1900) 2 Ch. 388.

nantor or whether he could also enforce it against the transferees of the land. Tho the reasoning in *Tulk* v. *Moxhay* is unsound the decision has been followed with practically no adverse criticism and we must therefore find some other reason for it so that we may fit it in with other parts of the legal system. This reason is found in the inadequacy of the common law with reference to rights in another's land,[9] together with the almost total lack of governmental supervision of building in Anglo-American countries. Tho it might be much better to have municipal control of the use of land than to enforce restrictions imposed by private individuals, such control by private individuals has on the whole been beneficial in the last half century's rapid growth of cities.[10]

Who are bound by equitable servitudes? A common law easement or profit was enforcible against any successor in title tho he paid value in good faith.[11] But like other equitable rights the benefit of an equitable servitude may not be enforced against

[9]The attitude assumed by Missouri courts toward the creation of equitable servitudes has been stated as follows: "We concede that in disposing of this question we must resolve any doubt in favor in the free use of property. The law prefers that the use of land in any lawful mode shall be unhampered by restrictive covenants; and, therefore, courts decline to extend the stipulation limiting the use beyond the clear meaning of the instrument when construed by the aid of the circumstances surrounding its execution.....But all courts profess to give effect to all the plain intention of the parties in imposing such restrictions, and should live up to their profession in good faith instead of seeking ingenious subtleties of interpretation by which to evade restrictions." *Sanders* v. *Dixon* (1905) 114 Mo. App. 229, 252, 89 S. W. 577.

[10]The common law rules with reference to such rights were quite rigid. For example, covenants running with the land bound only those who succeeded to the estate of the covenantor and could be created only where there was privity of estate; in this connection privity of estate was said to exist where there was an easement of profit or where there was the relation of grantor and grantee or that of lessor and lessee. Covenants running with the land usually occurred in leases. The most common ones running with the land against transferees were covenants to pay rent, to repair, to rebuild, not to use premises in a certain way, and not to assign the lease; those running with the land against the lessor's transferees were covenants to rebuild and covenants to renew the lease. In England covenants probably do not run against the transferee except in case of landlord and tenant. Tiffany, Real Property § 344.

[11]Easements and profits are, however, generally required by modern

a *bona fide* purchaser.[12] Tho a common law covenant running with the land was enforcible only against one who succeeded to the estate of the covenantor, there is no such limitation upon the enforcement of equitable servitudes. In *Abergarw Brewery Co.* v. *Holmes*[13] there was a covenant in a mortgage not to buy wines, beers, etc., from any one except the mortgagee; the restriction was enforced against an under-lessee with notice,[14] on the ground that it was the intention of the parties to bind every one claiming under the mortgagor. In order to protect the defendant in such a case the decree would of course be made conditional upon the mortgagee's complying with his promise to furnish the liquor.

It has long been considered as settled that one who obtained title from a trustee by adverse possession is entitled to hold it against the *cestui que trust* even though he knew of the trust.[15] On the other hand, one who obtains title by adverse possession of property subject to an equitable servitude does not thereby destroy the servitude even tho he had no notice of it.[16] The only way in which he can get rid of the servitude is by getting a release or by violating it and having the Statute of Limitations

registry acts in this country to be recorded; hence, in the absence of such a record, the *bona fide* purchaser will be protected. *Armor* v. *Pye* (1881) 25 Kan. 731; *Taylor* v. *Millard* (1890) 118 N. Y. 244.

[12]Independent of the recording acts, common law rights were enforcible against everyone while equitable rights were not enforcible against *bona fide* purchasers. But wherever the registry statutes apply there is a new line of division; if the right, whether common law or equitable, is recorded according to the statutory provisions, it is enforcible against all; if it is not so recorded, it is not enforcible against *bona fide* purchasers or attaching creditors. It has been generally held that the registry statutes allow and therefore require the recording of equitable servitudes; where, therefore, they have been properly recorded they are enforcible regardless of actual notice. See 18 Harv. Law Rev. 535. *Semple* v. *Schwarz* (1908) 130 Mo. App. 65, 72, 109 S. W. 633.

[13](1900) 1 Ch. 188.

[14]If he had not had notice, *aliter; Carter* v. *Williams* (1870) L. R. 9 Eq. 678.

[15]*Wych* v. *East India Co.* (1734) 3 P. Wms. 309.

[16]In *Re Nisbet and Potts' Contract* (1906) 1 Ch. 386. It is not clear whether the court did or did not regard notice as material. It should have been regarded as immaterial. See 18 Harv. Law Rev. 608.

run in his favor.[17] The reason for the distinction seems to be this: the holder of the equitable servitude is not interested in the ownership of the servient property but merely in the way the property is used; hence his rights have not been infringed till the property is used in a way inconsistent with the servitude. Or, to state it differently, while it is a breach of trust for the trustee to convey the trust property to any one without the consent of the *cestui que trust* or an order of court because he owes a fiduciary duty to protect and administer the property for the *cestui*, the holder of property subject to an equitable servitude is not a fiduciary to that extent; he may alien freely except that he must not destroy the servitude by conveying to a *bona fide* purchaser for value.[18] *A fortiori*, one who has disseised the owner of the servient property but has not yet acquired title is bound by the servitude.[19].

Influence of Tulk v. *Moxhay on promisor's common law liability.* Indirectly the decision in *Tulk* v. *Moxhay* has apparently affected the promisor's common law liability. In order to make it clear that the parties intended that the restriction should bind transferees it is now usual for the promisor to promise not only for himself but also for "his heirs, executors, administrators and assigns". It seems now to be assumed that this form of undertaking not only has the effect of making the restrictions enforceable in equity against transferees but also of making the promisor himself liable at common law for any violation of the restriction by transferees.[20] But a subsequent transferee with

[17]In this respect the holder of the equitable servitude is treated just as if he had a common law easement of profit.

[18]His position is similar to that of the owner of land subject to an equitable charge. The position of an unpaid vendor who has a right to specific performance is also analogous.

[19]*Mander* v. *Falcke* (1891) 2 Ch. 554. The court mentions the fact that he had notice; since he paid nothing for the land it would seem that he ought to be bound even if he had not had notice.

[20]*Hall* v. *Euin* (1887) 37 Ch. D. 74, *semble*. Even before *Tulk* v. *Moxhay* there was nothing to prevent a promisor from undertaking to be liable for acts done by his transferee; but at any time it would seem that the promise should not be construed as including such an extensive undertaking in the absence of clear evidence of intent. The mere fact that he promises "for his executors and administrators" ought not to be conclusive because the phrase may have been used as a mere form; his

notice who does not bind himself by contract with reference to the servitude is liable at common law for infringements by his alienee only if he authorizes such infringements.[21]

Who may enforce equitable servitudes. In determining the questions as to who may enforce equitable servitudes, equity will usually carry out the intentions of the parties,—either express or implied from all the circumstances of the case. While it is usually the intent to benefit not only the promisee as present owner of land in the vicinity, but also to benefit any future owner of such land, the parties may intend that the restriction be of less duration. In *Renals* v. *Cowlishaw*[22] the devisees in trust for the sale of a mansion house and residential property known as the Mill Hill estate and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Shaw, who covenanted, among other things, that the property should be used for private dwellings only and not for any trade or business. The conveyance did not state that the covenant was for the protection of the residential property or make any reference to the other adjoining pieces of land. The same

executor or administrator, of course, would be responsible in any event for a breach committed by him while he held the land. In *Clark* v. *Devoe* (1891) 124 N. Y. 120, a deed from the defendant of a lot in New York City, after reciting that the grantee was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators, and assigns . . . that he will not erect or cause to be erected, on said lot, any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance". The defendant conveyed the adjoining lot to X by a deed without any restriction; X erected a building which was used as a livery stable. In an action on the covenant for damages the court held that the covenant should not be so construed as to make the defendant liable for the act of X, because of the "serious result to the grantor with but slight benefit to the grantee". The *dictum* of the court that the covenant did not create an equitable servitude so as to bind transferees is, however, unsound; instead of requiring clear language to make the restriction enforcible by injunction against transferees, it would and should take clear language to limit the duration of the restriction to the time that the covenantor is owner of the property, because of the comparatively small value of a restriction thus limited.

[21] *Hall* v. *Ewin* (1887) 37 Ch. D. 74.

[22] (1878) 9 Ch. D. 125. See also *Badger* v. *Boardman* (1860) 16 Gray 559.

trustees also sold other pieces of land adjoining the Mill Hill estate, similar conveyances being made. The trustees later sold and conveyed the Mill Hill estate to Bainbrigge who died, and his devisees in trust sold and conveyed to the plaintiff. The pieces of land conveyed to Shaw came by several mesne conveyances into the hands of the defendants who carried on the trade of wheelwrights, smiths, and bent timber manufacturers and had erected a high chimney which emitted thick, black smoke, thus injuring the residential character of the neighborhood. The plaintiff was refused an injunction on the ground that the restriction was not meant to benefit the property, i. e., the subsequent owners, but merely to benefit the covenantees "to enable them to make the most of the property which they retained".

If the intent of the parties was that the restriction should exist only as long as the covenantees should hold the land, the decision seems unimpeachable.[23] But it ought to be pointed out that to refuse to protect the transferees in such a case very largely wipes out the commercial value of the restriction to the covenantee unless the transferee erroneously supposed he would be protected; for if at the time he contracted to buy he knew that he could not as purchaser of the land enforce the restriction, he obviously would pay little, if any, more than if there had been no restriction. The chief value of the restriction, therefore, is merely to keep the premises free till a sale could be made.[24] On the other hand, if the intent was clear to limit the duration of the restriction to the period of the trustees' ownership of the Mill Hill estate and the purchasers of the lots thus understood

[23]In *Coughlin* v. *Barker* (1891) 46 Mo. App. 54, 59, one Carpenter conceived the idea of establishing a residential section out of property owned by himself and several other proprietors; while he had this idea in mind, he sold some lots with restrictions; one of the lots is now owned by the plaintiff and another by the defendant. It appeared that his intention in inserting the restrictions was to retain control of the mode of building with the view of carrying out the scheme of improvement; having been compelled to abandon the scheme because unable to get the cooperation of some of the other proprietors, the restrictions were considered as having come to an end.

[24]This might be of sentimental value to the occupants, and safeguard their own comfort during their occupancy.

it and bargained accordingly they are entitled to be free from the restriction the moment the trustees convey the property.[25]

The shift in the basis of equity jurisdiction against the promisor. In the restrictive agreement cases before *Tulk* v. *Moxhay* the equity courts based their jurisdiction upon the threatened injury to the promisee's enjoyment of his own land in the vicinity and upon the inadequacy of the common law remedy to compensate for such an injury; and in *Tulk* v. *Moxhay,* where the court assumed without argument that they would have had jurisdiction to enjoin the promisor, there was such threatened injury. Since *Tulk* v. *Moxhay,* however, there has been a change of attitude upon the part of the courts that is none the less curious because probably unconscious. In *Peck* v. *Conway*[26] the master found as a fact that the violation of the restriction "would be no appreciable damage or injury to the plaintiff's premises". In discussing this, the court said: "Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage". In other words, the court apparently regarded the plaintiff as being substantially in the same position as if she had bargained for the fee instead of merely for the power to control the use of the land. That is, if she had contracted to buy the fee it would of course be no defense to a suit for specific performance that the plaintiff would be as well or better off without the land; the fact that it is land is a sufficient reason in itself. Similarly, having bargained for a restriction on the land, she is now considered as having bought an interest in the land and the fact that she would not otherwise be damaged if she did get specific performance is no longer considered important.[27]

[25]If the restriction had been thus limited in duration, the lot purchasers might have paid more than they would if the restriction was not so limited but whether they paid more or less has no bearing on the enforcibility of the restriction.

[26](1876) 119 Mass. 546.

[27]That the plaintiff need not show that the breach caused any damage to his own land in the vicinity seems to be well settled in Missouri. In *Hall* v. *Wesster* (1879) 7 Mo. App. 56, 62, the court said: "The objection may be founded on the merest whim". See also *Kenwood Land Co.* v. *Hancock Investment Co.* (1913) 169 Mo. App. 715, 722, 155 S. W. 861; *Sanders* v. *Dixon* (1905) 114 Mo. App. 229, 240, 89 S. W. 577.

In other words, she is considered as being the equitable owner of an interest in the servient land from the moment the restriction is intended to become operative.

May there be an equitable servitude in gross? If the covenantee need not show any threatened injury to his own premises in order to get an injunction, but need only to show that he has bargained for a restriction on the promisor's land, is it necessary that the promisee should have any land in the vicinity which might be benefitted? In *Van Sant* v. *Rose*[28] the plaintiffs had sold to the defendant Frank Rose a lot with a restriction against erecting a flat or tenement building on the premises; the defendant Frank Rose conveyed the premises to his wife, Alvida Rose, and both defendants were proceeding to erect a flat building. In answer to a bill for an injunction the defendants set up that the plaintiffs did not at the time of filing their bill or for a long time prior thereto own other property anywhere in the vicinity or neighborhood that would be affected by a breach of the covenant. In giving the injunction the court argued that the purchaser presumably paid a less price because of the restriction and therefore the plaintiff ought to be allowed to enforce it to prevent the defendants from being unjustly enriched; and that the plaintiff's motive in creating and attempting to enforce the restriction was of no importance. If this reasoning[29] were followed to its logical conclusion the plaintiffs would have been able to enforce a restriction even tho they had never owned any land in the vicinity except that which they sold to the defendant Frank Rose,[30] indeed, even if the plaintiffs had never owned any land whatever but had bargained with the defendant in some

[28](1912) 170 Ill. App. 572, (1913) 260 Ill. 401.

[29]While this reasoning is open to criticism, the decision might conceivably be supported on the ground that the plaintiff in requiring the covenant and in suing for an injunction intended to represent and did represent the property owners in the vicinity and that the injunction was given to protect them. No hint of this appears in the case.

[30]In the supposed case, as in the actual case of *Van Sant* vs. *Rose,* the purchaser probably paid a less amount for the lot because of the restriction, but how much is probably uncertain. If the injunction were refused, would it be possible for the promisee to force the defaulting promisor to make good this deduction in a suit in quasi-contract? It would seem that this ought to be allowed though the Illinois Court of

other way[31] for the restriction. Whether the equity courts will take these last two steps and recognize to the full the doctrine of equitable servitudes in gross[32] remains to be seen. The decision in *Van Sant* v. *Rose* is a striking example of the tendency of equity in the United States to become mechanical.

While one having an estate in possession in the dominant property can get an injunction without showing any damage to such property[33] it has been held that one who has an estate in remainder or reversion after a life estate and is not the promisee must show that the breach would cause injury to his estate in order to get an injunction.[34] This is analogous to common law protection of property rights; a person in possession may bring trespass for a violation of the possession and recover judgment without proving any damage; the remainderman must bring an action on the case and prove damage to his estate in the land in order to recover. If the remainderman were also the promisee, he would not, of course, be under the necessity of showing any such damage if *Van Sant* v. *Rosse* should be followed.

Equitable servitudes attaching to after acquired property. In *Lewis* v. *Gollner*[35] one Gollner bought a lot in a residential sec-

Appeals in *Van Sant* v. *Rose* said: "there can be no adequate recovery at law"; the uncertainty of the amount ought not to be considered an insuperable obstacle to such relief. And if he can get such relief, is not this an argument against allowing the injunction to one who no longer has any economic interest in the neighborhood to be protected?

[31]If the defendant has bargained for a cash payment, the plaintiff's right in quasi-contract seems clear.

[32]May the same equitable servitude be treated as both appurtenant and in gross? For example, suppose that in *Van Sant* v. *Rose* the plaintiffs at the time of the sale to Frank Rose had other property in the vicinity which they intended to protect by the restriction; later they sell this other property to X who does not wish to enforce the restriction; may the plaintiffs do so? In such case it might well be said that the plaintiff should not be entitled because if the defendant should be enriched it would be at the expense of X and not of the plaintiffs. But suppose that the promise was made expressly for the benefit of the plaintiffs' other land and also for the benefit of the plaintiffs personally? If we follow the reasoning of *Van Sant v. Rose* it is difficult to see how the plaintiffs could be denied an injunction.

[33]*Dickenson* v. *Grand Junction Canal Co.* (1852) 15 Beav. 260.

[34]*Johnstone* v. *Hall* (1856) 2 K. & J. 414.

[35](1891) 129 N. Y. 227.

tion, intending to erect a tenement building; the plaintiff, representing persons who owned residences in the neighborhood, sought to buy him out and did buy him out, for the sole purpose of saving the neighborhood from flats. The plaintiff paid Gollner $6,000 more than Gollner had agreed to give for the lot, the latter agreeing that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more". Immediately afterward Gollner bought a lot diagonally opposite his first purchase and began erecting a seven-story flat. Plaintiff's attorney threatened action and one of the materialmen refused to continue to supply him further, so Gollner sold and conveyed the premises to his wife who took with knowledge of all the facts and with the intention of protecting her husband. The plaintiff sought an injunction against Gollner and his wife; the lower court refused to give it but this was reversed by the upper court. It is to be observed here that at the time the contract was entered into, the defendant Gollner had no land to which an equitable servitude could attach and consequently there was, strictly speaking, no equitable servitude at that time. The court seemed to think that the contract created such a situation between the parties that an equitable servitude came into existence the moment that Gollner acquired a piece of land in the immediate neighborhood and would therefore be enforcible against a purchaser of the land with notice of the facts. This is somewhat analogous to the creation of a trust of after acquired property.[36] The actual facts of the case did not require such reasoning; it was clear that Gollner's wife was colluding with him to help him escape the consequences of his contract and even if the obligation of Gollner be considered as merely personal, damages at law being inadequate, the court properly enjoined the wife as well as Gollner. But if Gollner transferred to a stranger who had no intent to aid Gollner to evade his contract but did know the facts, such a transferee could be enjoined only on the ground suggested by the court.

Restrictive agreements as to a business. Tho the great bulk of equitable servitudes consist of restrictions placed on one piece

[36]*Pratt* v. *Tuttle* (1884) 136 Mass. 233.

of land, for the benefit of another piece of land,[37] they may be imposed for the benefit of a business and if so intended the benefit will pass to the assignee of the business.[38] Similarly, the benefit of a personal covenant not to compete with the promisee in business will pass to the assignees of the promisee, if so intended.[39] On the other hand, the restriction may be enforced against the assignees of the covenantor's business. In *Wilkes* v. *Spooner*[40] X sold to the plaintiff his business of general butcher, covenanting not to establish a rival business within three miles. X also conducted a pork business at a nearby shop which he held on lease. This lease X surrendered in order that his son, the defendant, who bought the pork business with notice of this covenant, might get a new lease and set up a business to compete with the plaintiff's. The real reason for enjoining the defendant was that he was the assignee of the father's business—not that he happened to occupy the same building; tho the court seemed to put it on the latter ground, it is difficult to see how X, having only a term for years, could create an equitable servitude on the land which would outlast his lease.

The formality essential to the creation of equitable servitudes. Altho equitable servitudes are treated as technical property rights; i. e., they are enforced tho the plaintiff would suffer no damage to other land by a breach,—no particular formality is required for their creation. Thus not only is a seal not necessary[41] but there is a conflict of authority as to whether any written memorandum at all is necessary to comply with the Statute of Frauds.[42] Furthermore, it is not important whether

[37]This is a convenient figure of speech; legal rights and obligations may strictly be predicated only of human beings.

[38]*Abergarw Brewery Co.* v. *Holmes* (1900) 1 Ch. 188.

[39]*Francisco* v. *Smith* (1894) 143 N. Y. 488. As the court pointed out, since the benefit passed to the assignee of the business, no injunction can be granted if the business is discontinued; but a discontinuance does not put an end to the right but merely suspends the enforcement, so that if the business is later resumed the covenantor can then be enjoined. *Clegg* v. *Hands* (1890) 44 Ch. D. 503.

[40](1911) 2 K. B. 473, 24 Harv. Law Rev. 574.

[41]*Dorr* v. *Harrahan* (1869) 101 Mass. 531.

[42]See Browne, Statute of Frauds (4th ed.) § 269; but see 5 Harv. Law Rev. 278: "If the acts and the land are stated in writing the court

the restrictions take the form of covenants,[43] reservations, or conditions.[44]

But altho form may not be essential it is as a practical matter very important in drawing up instruments containing restrictions that express stipulations be made. If the covenantee wishes to make certain that his transferees may take advantage of the restriction, the safest way is to have an express provision in the deed that it is for the benefit of the land; if he fails to do this, it will then become a question of construction for the court. In *Tallmadge* v. *East River Bank*[45] it was held that if the sale was made with reference to a plat showing the restriction, that was enough.[46] And in *Peck* v. *Conway*[47] and *Barrow* v. *Richard*[48] it was decided that if on a fair construction of the whole instrument an intention to benefit the land appeared, that was sufficient.[49] If the seller intended to sell all the property and not retain any himself, this fact tends strongly to show that the restriction was meant to benefit the future owners of the land.[50]

considers the statute satisfied, and will gather the other terms of the restriction by reading the writing as a whole in the light of surrounding circumstances".

[43]*Peck* v. *Conway* (1876) 119 Mass. 546.

[44]*Parker v. Nightingale* (1863) 6 Allen 341; 5 Harv. Law Rev. 277.

[45](1862) 26 N. Y. 105.

[46]In *Zinn* v. *Sidler* (1916) 268 Mo. App. 680, 187 S. W. 1172, one Wright had laid out and platted thirty-one acres in lots, acknowledged the plat and had it recorded; across the lots and blocks on this plat checked or broken lines were drawn designated as "building lines"; the court held that this was insufficient evidence of Wright's intention to impose restrictions, evidently agreeing with the defendant's contention that the lines constituted merely a suggestion to the future owners of property in the addition. For a comment upon this case, see 15 Law Series, Missouri Bulletin, 19.

[47](1876) 119 Mass. 546.

[48](1840) 8 Paige 351.

[49]5 Harv. Law Rev. 278: "The ownership and character of buildings in the neighborhood, plans, building schemes, the existence of similar restrictions upon other lots, even parol agreements among neighbors may be shown as bearing upon the probable intention of the contracting parties".

[50]See the discussion of mutual covenants, *post.* And see *Nottingham Co.* v. *Butler* (1886) 16 Q. B. D. 778. In *Meriweather* v. *Joy* (1900) 85 Mo. App. 634, the vendor at the time of the sale to the defendant, had no

Whether equitable servitudes may require affirmative action. With the exception of the spurious common law easement of fencing, common law easements require no action on the part of the owner of the servient property.[51] An equitable servitude, on the other hand, may impose a duty to act tho the court may as a practical matter refuse relief.[52] If the act is of such a nature as to require little or no supervision, enforcement will be decreed; e. g. in *Whittenton Mfg. Co. v. Staples*,[53] where the covenant was to pay the grantor or his assignee one-fifth of flowage damages caused by a reservoir dam. On the other hand, if the act is such as to require a great deal of supervision, equity will usually refuse relief[54] as a matter of the balance of convenience

property fronting on the street, having already conveyed what he had there to his grandchildren without restriction; the court very properly argued that these circumstances tended to show that he meant the building line restriction to protect the grandchildren, of whom the plaintiff was one.

[51]Tiffany, Real Property § 312.

[52]Because of the difficulty of supervision and the interference with the personal liberty of the defendant. It is a question to be decided as a matter of the balance of convenience. See 5 Harv. Law Rev. 278, 279.

[53](1895) 164 Mass. 319. See also *Atlanta, etc. Ry Co.* v. *McKinney* (1906) 124 Ga. 929, in which a covenant to convey water to the covenantee's residence was enforced against the covenantor's assignees. In *Clegg* v. *Hands* (1890) 44 Ch. D. 503, a covenant by a lessee to buy beer only of the lessor was indirectly enforced in favor of the lessor's assignees by enjoining the lessee from buying beer elsewhere. It thus combines the peculiar principles of both *Tulk* v. *Moxhay* and *Lumley* v. *Wagner* (1852) 1 De Gex, M. & G. 604. See 14 Harv. Law Rev. 301.

[54]The question of giving affirmative relief may also arise where the defendant has already violated the restriction by erecting a building before the plaintiff asks for relief; if the removal of the building would cause damage to the defendant wholly disproportionate to the damage caused to the plaintiff by the breach, the court will exercise its discretion in refusing such relief. In *Kenwood Land Co.* v. *Hancock Investment Co.* (1913) 169 Mo. App. 715, 155 S. W. 861, the defendant had violated a restriction by building a duplex house; the court held that the proper relief was not to order its removal but to decree that it should be occupied by only one family until the restriction should expire at the end of fifteen years. In *Sanders* v. *Dixon* (1905) 114 Mo. App. 229, 254, 89 S. W. 577, the court held that the defendant should have the opportunity to alter the building so as to make it a single residence before ordering him to remove it; and in *Thompson* v. *Langan* (1913) 172 Mo. App. 64, 154 S. W. 808, an order for the removal of a building erected

unless the hardship on the plaintiff would be very great if relief were denied.[55]

Mutual covenants in general building schemes. Another illustration of the non-technical way in which equitable servitudes may be created is shown in the rules applying to mutual covenants in general building schemes. In *Nottingham Patent Brick* and *Tile Co.* v. *Butler*[56] thirteen lots were put up at auction, subject to certain sale conditions as to the use of the land, which were also expressed in the deeds of conveyance to the various purchasers. It was held that since the grantor intended to sell and did sell the whole property, the restrictions were evidently meant to benefit each lot as against all the others, and equity would effectuate this intention.[57] In *Barrow* v. *Richard*[58] it did not appear that the vendor intended to sell all his property in the vicinity, but in each of the conveyances which he made there was included a condition against the property being used for "any other manufactory, trade, or business whatsoever which should or might be in anywise offensive to the neighboring inhabitants". This was held to be sufficient to show an intention to benefit each of the lots sold[59] against the others. The court in this case

for a hotel was denied if it could be so changed as to comply with the restriction. In *Forsee* v. *Jackson* (1915) 192 Mo. App. 408, 182 S. W. 783, the defendant had erected a building with a bay window extending nine inches beyond the building line; an affirmative decree for the removal of the bay window was denied because of the great damage it would cause to the defendant. In such a case, it would seem that the court should have given to the plaintiff, in lieu of the injunction, compensation for the plaintiff's equitable property right which is thus confiscated.

[55]*Haywood* v. *Brunswick Building Society* (1881) 8 Q. B. D. 403 (covenant to keep in repair not enforced against assignee).

[56](1886) 16 Q. B. D. 778.

[57]The fact that the lots were not sold on the same day and the further fact that some were sold at private sale were held to be unimportant since it was a general scheme. See *Collins* v. *Castle* (1887) 36 Ch. D. 243. Even if there is no general scheme the restrictions may be mutual, if it can be shown from some other source that the vendor intended the covenant to bind each lot in favor of all the rest. *Doerr* v. *Cobbs* (1909) 146 Mo. App. 342, 351, 123 S. W. 547.

[58](1840) 8 Paige 351.

[59]As to whether other "neighboring inhabitants" not purchasers from the vendor, might enjoin as expressly intended beneficiaries of the contract, *quaere.*

admitted that the plaintiff could not recover at law,[60] and it must be admitted that it would have been difficult if not impossible to have worked out any principle at common law which would allow the purchaser of the lot first sold to enforce against a purchaser of another lot a covenant which was not in existence at the time of the sale of the first lot. Equity, however, is able to and does carry out the intention of the parties[61] by allowing the purchaser of any lot to enforce the restriction[62] against the

[60]This was before the famous case of *Lawrence* v. *Fox* (1859) 20 N. Y. 268 which gave a payment beneficiary of a contract a right to sue thereon; but it is at least doubtful whether the present New York law would regard the plaintiff as coming within the principle of that case.

[61]See 6 Harv. Law Rev. 290; 12 Col. Law Rev. 159. In *Child* v. *Douglas* (1854) Kay 560, it is suggested that the later purchasers are assignees from the vendors of the benefit of the covenants made by the earlier purchasers, but this does not explain the obligation of the later purchasers to the earlier. In *Parker* v. *Nightingale* (1863) 6 Allen 341, it was held that since the vendor was only a dry trustee of the covenants for each of the purchasers he need not be joined. The purchasers would seem to be beneficiaries of the contract rather than *cestuis que trust,* however. That mutual covenants may exist without a sale but merely by agreement between two owners of neighboring property, see *Trustees of Columbia College* v. *Lynch* (1877) 70 N. Y. 440.

[62]In *Doerr* v. *Cobbs* (1909) 146 Mo. App. 342, 351, 123 S. W. 547 the court held that if a senior grantee wished to enforce a restriction against a junior grantee, stronger evidence of intention to benefit him was necessary than in the case where the parties were reversed. "A difference in principle can be discerned between the case of a grantee holding premises under a subsequent conveyance from the common source of title and seeking to enforce a covenant restricting the use of nearby premises, contained in a deed of prior date, from the case of a man who, holding title under a prior grant, seeks to enforce a covenant contained in a deed later than the one under which he claims. The junior grant is supposed to have been made for a consideration enhanced by the circumstance that the use in obnoxious ways of property adjacent to or in the neighborhood of that conveyed had been restrained in previous conveyance; or, to borrow the pungent phrase of Lord Hatherly, in *Child* v. *Douglas,* Kay 560, the later grantee 'must be said to have bought the benefit of the former purchaser's covenant.' And, as no injustice to the former purchaser will be occasioned by holding him to the observance of the restriction in his deed, it is reasonable to allow any property-owner who bought later from the same vendor, and who will be damaged by a breach of the restriction, to restrain a breach. But the same reasoning does not obtain as widely in favor of permitting a senior grantee of one

purchaser of any other lot.[63] In such a building scheme, however, each lot is treated as a unit; hence, if it is later divided, one part of the lot can not enforce against the other part,[64] but each part may enforce the restriction against any other lot or part thereof or *vice versa.*

While it seems to be an unsettled question whether in the ordinary case a covenant will bind after acquired property of the covenantor,[65] it has recently been held in a general building scheme case that after acquired property may be bound at least in the hands of a transferee. In *Schmidt* v. *Palisade Supply Co.*,[66] X, the owner of land, projected a definite building scheme, including in his project land to which he had no title. He later acquired this land and conveyed a part of it to the defendant, subject to the restrictions of the general plan. It was held that a purchaser of part of the land originally owned could enforce the restriction against the defendant.[67]

lot to insist on a restrictive covenant inserted in a later conveyance of another lot, inasmuch as the covenant to be enforced, was not in existence when the senior grantee bought, and the presumption that he bought in reliance on its protection does not arise naturally. In such an instance it must appear in some manner from the deed to the senior grantee, or *dehor*s said deed, that the vendor intended the covenants to bind himself and those who thereafter should derive title from him to property in proximity to the complainants". If there had been a general building scheme, however, there would have been no occasion for making the above distinction because the general scheme would supply the evidence of intention to benefit each lot as against every other lot, regardless of the time of sale.

[63]Tho equitable servitudes have grown out of the specific performance of contracts, it may be questioned whether it is at the present time necessary for the existence of equitable servitudes that there be any common law contract right against any one. For example, if A has only ten lots and he sells them all at one auction according to a building scheme, it is at least doubtful whether there is any personal liability on any one. If there is not, then the situation is analogous to a conveyance of land with a reservation of a common law easement or of a rent charge.

[64]*King* v. *Dickeson* (1889) 40 Ch. D. 596; *Barney* v. *Everard* (1900) 67 N. Y. Supp. 535. See 7 Col. Law Rev. 623.

[65]See *ante.*

[66](1912) 84 Atl. 807 (N. J.); 13 Col. Law Rev. 77.

[67]It is an interesting question whether X himself would be bound by the general restrictions as to the after acquired land. There seem to be no cases.

Failure of purpose of restriction. Tho the plaintiff may get an injunction without showing damage to his other property, he may be refused preventive relief where it is not possible thereby to secure to the plaintiff the benefit intended. In *Jackson* v. *Stevenson,*[68] lots had been sold in 1865 under a general building scheme with restrictions against the use of the lots for trade or business purposes. After 1873 the character of that portion of the city changed from a residential to a business district. In 1891 the plaintiff sought an injunction but was refused because the court's decree could not restore the residential character of the neighborhood, and would therefore be practically futile.

The court, however, did not dismiss the bill but retained it for the sake of assessing damages. This is to be justified only upon the ground that the servitude has not actually come to an end but that it is merely unenforcible because of practical difficulties. The court in *McClure* v. *Lcaycraft, supra,* seemed to proceed upon the same theory in suggesting that the plaintiff could recover damages at law. It is difficult to understand this last suggestion because the defendant was not the original covenantor but a purchaser from him; but it is understandable to allow the plaintiff a sum of money in equity as compensation for an equitable property right which the equity court in its dis-

[68](1892) 156 Mass. 496. See also *McClure* v. *Leaycraft* (1905) 183 N. Y. 36, 19 Harv. Law Rev. 305. See also *Columbia College* v. *Thacher* 87 N. Y. 311, where the change had come about after suit brought but before decree. There seems to be an unfortunate tendency in Missouri to deal with this question in a mechanical way. In *Thompson* v. *Langan* (1913) 172 Mo. App. 64, 83, 154 S. W. 808, the court said: "But it is claimed that the general plan upon which Hamilton Place was laid out and the general object of its creation had been abandoned and that conditions in the neighborhood had changed, and that therefore, all of the restrictions fell in. We considered both of these questions in *Spahr* v. *Cape,* [1909] 143 Mo. App. 114, 122 S. W. 379, and again in *Noel* v. *Hill,* [1911] 158 Mo. App. 426, 138 S. W. 364. In the last named case, as here, it was in evidence that on adjoining streets, and across the same street, there were no restrictions, that there were stores and shops across that and on streets running to the north of and bordering on the restricted locality, the restricted section covering but one city block; in short, that outside of the restricted district, business had grown up and the neighborhood had changed. We held in each of the cases, as in others referred to, that these facts did not put an end to the restrictions. We hold,

cretion refuses to enforce.[69] In *Amerman* v. *Dean*[70] the trial court having awarded $1,500 in lieu of an injunction the upper court ordered that the plaintiff should not get the amount unless she executed to the defendant a release of the servitude.

Public policy against enforcing restriction. A contract not to compete with the promisee may be invalid at law and therefore not enforcible in equity because contrary to public policy[71] in favor of freedom. For the same reason a court of equity may refuse to enforce an equitable servitude. In *Norcross* v. *James*,[72]

on the application of those principles to the facts here, that the restrictions here invoked are not removed by reason of any change of conditions". See also *Bohn* v. *Tyrol Investment Co.* (1913) 178 App. 1, 160 S. W. 588. If the restricted district is small and surrounded by unrestricted territory which is given over to business buildings, it seems of doubtful propriety to continue the enforcement of the restrictions. On the other hand the court is quite right in saying that the mere fact that the restricted lot has become more valuable for business than for residential purposes is not a sufficient reason for denying an injunction. *Noel* v. *Hill* (1911) 158 Mo. App. 426, 450, 138 S. W. 364; *Spaln* v. *Cape* (1909) 143 Mo. App. 114, 122 S. W. 379.

[69]In *Sanders* v. *Dixon* (1905) 114 Mo. App. 229, 256, 89 S. W. 577, the defendant contended that the time limit for the restrictions had expired. The court said: "If, in truth, the restrictions have lapsed, there is no cause to alter the building as it stands for it might immediately be converted into a flat without violating the covenant..... If the restrictions have lapsed, the plaintiffs may be entitled to redress for damages sustained from the construction and maintenance of the flats—redress which a court of equity would have power to award as essential to complete justice, in the present case wherein the plaintiffs have shown an equity".

[70](1892) 132 N. Y. 355.

[71]Whether, in order to be valid, restrictions must be reasonable can hardly be said to be settled in Missouri. In *Compton Hill Improvement Co.* v. *Strauch* (1911) 162 Mo. App. 76, 87, 141 S. W., 1159, the court suggests that they must; on the other hand, in *Miller* v. *Klein* (1913) 177 Mo. App. 557, 571, 160 S. W. 562, the court said: "It is conceded by both parties that it is not necessary for the plaintiff to make any showing that the restrictions as originally contained in the deeds are reasonable or in the opinion of the court desirable". The latter case is an illustration of the unfortunate tendency to deal with equity questions in a formal, mechancial way. It is at least doubtful whether the economic interest of vendors will prove to be a sufficient safeguard against imposing undesirable restrictions.

[72](1885) 140 Mass. 188.

one K conveyed to F a quarry, retaining the surrounding land. In the conveyance there was a covenant not to open any quarry on the land retained. Plaintiff, a subsequent transferee of the quarry, sought to have the covenant enforced against a subsequent transferee of the surrounding land. Relief was refused on the ground that it would tend to create a monopoly for the plaintiff. Whether, however, the restriction is against public policy ought to be determined on the facts of each case;[73] there is nothing in the report of the case to show that the restriction would injure the public,[74] tho that might have been the fact; e. g. if the stone were a peculiar sort which the public could not get on the market. If, however, the stone were quite common and easily procured by the public, there would seem to be no satisfactory reason for refusing relief.[75]

Equitable servitudes upon and for the benefit of chattels. It may be very important for the vendor or lessor of a chattel to impose restrictions upon the use of the chattel in the hands of the lessee and his assignees or upon the sale of it in the hands of the purchaser and his assignees. A few cases have enforced such restrictions, thus carrying out the intent of the parties. In

[73]In *Noel* v. *Hill* (1911) 158 Mo. App. 426, 443, 138 S. W. 364, the defendant contended that the restriction against the carrying on of business violated the so-called rule against perpetuities which in substance requires that interest in property must vest within twenty-one years after lives in being at the creation of the interest. The court's holding the contention invalid was proper because the interests of both the dominant and servient tenants are vested at once, just as in the case of the creation of a common law easement. The reason given by the court for the decision on this point was that there were persons in being who could convey an absolute fee in possession; while this is true it does not really state an adequate reason; the mere fact that there are persons who could convey an absolute fee does not prevent a future contingent interest from being bad within the so-called rule against perpetuities.

[74]In *Burdell* v. *Grandi* (1907) 152 Cal. 376, the owner of a large tract of land divided it into lots and conveyed them to different purchasers by deeds containing covenants by the vendors not to sell intoxicating liquors; the purpose was to protect his own saloon from competition. The covenants were held void as creating a monopoly. See 21 Harv. Law Rev. 450. See also *Brewer* v. *Marshal* (1868) 19 N. J. Eq. 537.

[75]In the very similar case of *Hodge* v. *Sloan* (1887) 107 N. Y. 244, relief was given; the question of monopoly seems not to have been raised.

Murphy v. *Christian Press Association Publishing Co.*[76] the plaintiff bought of the Catholic Publication Society a set of electrotype plates, covenanting that it would not sell plates to any one else, and that it would not sell books at less than a certain price. Later the Society was dissolved and the receivers sold the plates to the defendant who knew of the agreement. The defendant published and sold books at a less price than the Society agreed to sell; the plaintiff was granted an injunction. Here the covenantee was not the business because the defendant did not buy out the business but merely the plates and copyright, so that the dominant property here was the plates sold and the servient property was the plates retained. It is to be observed that the chattels involved here were protected by the copyright law; it is also held that the price of patented articles may be similarly controlled.[77] It was for a while contended[78] that the same rules should be applied to proprietary articles such as so-called patent medicines where there was a trade secret involved; but the present tendency is in favor of holding restrictions in such cases invalid.[79] Where neither statutory nor natural monopoly is involved the public interest in free trade in chattels should *a fortiori* prevent the upholding of such restrictions.

Effect of plaintiff's default or acquiescence. Like other incorporeal property rights, an equitable servitude may be released by the owner of the dominant property and thereby extinguish-

[76](1899) 38 N. Y. App. 426. See also *N. Y. Bank Note Co.* v. *Hamilton Bank Co.* (1895) 83 Hun. 593; 20 Harv. Law Rev. 335.

[77]See *Park & Sons Co.* v. *Hartman* (1907) 153 Fed. 24, and cases cited.

[78]See 17 Harv. Law Rev. 415.

[79]*Dr. Miles Medical Co.* v. *Park & Sons Co.* (1911) 220 U. S. 373, Price Restriction on the Re-sale of Chattels, by William J. Shroeder, 25 Harv. Law Rev. 59-69. Mr. Shroeder's argument is that while the protection of the statutory monopoly of the patentee and copyright owner extends to the chattels produced thereunder, the natural monopoly of the possessor of a secret exists only so long as the secret is preserved and has no relation to the article manufactured by its use when once it is offered as a subject of commerce; that while the owner of the statutory monopoly gives the benefit of his discovery to the public after a certain period, the owner of a trade secret gives nothing to the public for his protection against fraudulent discovery or disclosure.

ed;[80] whether the failure of the purpose of a restriction puts an end to the right or merely to the plaintiff's equitable remedy thereon has already been discussed.[81] A plaintiff may, of course, be estopped[82] by observing without objection the defendant's expenditure of money in violating the restriction, tho it is at least doubtful whether this would bar the plaintiff from objecting to further violations.[83] Where the restrictions are mutual a plaintiff may be barred because he has himself violated the restriction upon his own land;[84] and where a landlord imposed building restrictions upon several tenants for their mutual benefit as well as his own and so failed to enforce them against some of the tenants that the object of the restriction was defeated it was held that he had lost the power to enforce against others.[85]

[80]Tiffany, Real Property § 275.

[81]See *ante*.

[82]In *Hall* v. *Wesster* (1879) 7 Mo. App. 56, 63, there is a *dictum* that if the plaintiff had known that the defendant was erecting the buildings he might have been estopped. In *Miller* v. *Klein* (1913) 177 Mo. App. 557, 160 S. W. 562, the court held that mere silence and inaction in allowing other persons to erect flats on adjoining land did not amount to an estoppel unless it amounted to a fraud on the plaintiff. And in *Thompson* v. *Langan* (1913) 172 Mo. App. 64, 86, 154 S. W. 808, the court took the position that permitting violations by others might show abandonment but not estoppel.

[83]*Whitney* v. *Union Ry. Co.* (1858) 11 Gray 359.

[84]*Coates* v. *Cullingford* (1911) 131 N. Y. Supp. 700; 12 Col. Law Rev. 158. In *Compton Hill Improvement Co.* v. *Strauch* (1911) 162 Mo. App. 76, 141 S. W. 1159, several plaintiffs sued for an injunction; one of them had violated the restriction but the others had not; it was held those who had not violated the restriction were entitled to the injunction.

[85]*Roper* v. *Williams* (1822) Turn. & R. 18. See also *Ocean City Ass'n.* v. *Chalfant* (1903) 65 N. J. Eq. 156 (restrictions against trade or business on Sunday); 17 Harv. Law Rev. 138; 4 Col. Law Rev. 73. This is probably what the court had in mind in *Thompson* v. *Langan* (1913) 172 Mo. App. 64, 86, 154 S. W. 808, when it said that such a defense amounted to abandonment and not to estoppel; that is, that if the object of the restrictions had thus been defeated, it was not necessary to show that the defendant had changed his position in reliance upon the plaintiff's implied representations.

While mutual restrictions may come to an end by mutual abandonment, a modification of the restrictions may be made by all parties without extinguishing the restrictions.[86]

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[86]See *Sanford* v. *Keer* (1912) 80 N. J. 240, where it was held that building a garage on that portion of the lot intended for a dwelling house was not protected by a modification allowing necessary or desirable outbuildings. In *Scharer* v. *Pantler* (1907) 127 Mo. App. 433, 105 S. W. 668, the grantor sold several lots with a building line restriction of twenty-five feet. Soon afterward the grantor and grantees erected buildings on a fifteen foot line. It was held that this was an abandonment, not a modification, and that the defendant could not be enjoined from erecting a building only five feet from the street.